Property is but a complex or bundle of rights, privileges, powers and immunities, and of these the power of disposal is certainly one of the most important. To whittle away the husband's power of disposal by denuding him of the power of donation and making his *jus disponendi* subject to the will of another, clearly appears to be a deprivation of property, and therefore beyond the power of the legislature.

T. W. D.

CONSTITUTIONAL LAW: CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT—The declaratory judgment has been advocated and in some jurisdictions[1] used as one method of increasing the usefulness and efficiency of the courts. Such a judgment defines and declares disputed legal rights and duties. It differs from the ordinary judgment not only in that no coercive relief need accompany it but also in that it may be procured before a right has been violated. Like the ordinary judgment it can be given only when there is a bona fide dispute as to existing legal obligations and, like that judgment, it is a binding and final determination of those obligations. The nature, history and advantages of the declaratory judgment have been sufficiently discussed in previous numbers of this REVIEW.[2] When the last session of the legislature added sections 1060, 1061, and 1062 to the Code of Civil Procedure and thus provided for declaratory relief in California, the legal profession felt that an important step had been taken toward increasing the efficiency of legal machinery. In the case of *Newberry v. Newberry*,[3] one of the first to come up under the

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still leave a difference between separate property acquired in another state and community property. Furthermore, Arnett v. Reade was an appeal from the Territory of New Mexico and merely expresses the interpretation of a territorial act by the U. S. Supreme Court, and hence would not be binding on state courts.

[1] In Scotland the declaratory judgment has been used for several centuries; it has been the link between early forms of declaratory relief existing in the Roman and early civil law and that which has been developing continuously in England since 1852. Edwin M. Borchard, The Declaratory Judgment—a Needed Procedural Reform, 28 Yale Law Journal, 1, 105.

[2] Maurice E. Harrison, The Declaratory Judgment in California, 8 California Law Review, 133; Maurice E. Harrison, California Legislation of 1921 Providing for Declaratory Relief, 9 California Law Review 359. The subject has been discussed in other periodicals; see the articles of Prof. Borchard cited supra, n. 1; Edwin M. Borchard, Uniform Act on Declaratory Judgments, 34 Harvard Law Review, 697; E. R. Sunderland, A Modern Evolution in Remedial Rights, 16 Michigan Law Review, 69, printed also in 88 Central Law Journal, 6; E. R. Sunderland, The Courts as Authorized Legal Advisers, 54 American Law Review, 161; James Schoonmaker, Declaratory Judgments, 5 Minnesota Law Review, 32; Frank K. Dunne, The Declaratory Judgment, 25 Reports of the American Bar Association, 383; see also Report of Committee on Declaratory Judgments (1921) 26 Reports of American Bar Association, 386.

[3] In the Superior Court of the State of California, in and for the County of Los Angeles, B97086, reprinted in The Recorder of Dec. 30, 1921.

new law, the Los Angeles Superior Court has dropped a monkey-wrench into the machinery by declaring the law unconstitutional.

The case is decided on the ground that the law imposes a non-judicial function on the courts and therefore violates the section of the California Constitution providing for the separation of the powers of government and forbidding an encroachment of one branch upon the domain of the others without constitutional authority.[4] The analysis of the judicial function presented in Anway v. Grand Rapids Railway Company,[5] which held a similar Michigan statute[6] unconstitutional, is adopted. The reasoning of the latter case has been severely criticized[7] and has been recently rejected by the Kansas Supreme Court[8] in upholding the constitutionality of the Kansas Declaratory Judgment Act.[9]

In considering this problem, it is well to remember that the theory of a division of powers of government as necessary to civil liberty and of the scope of each department was advanced by Montesquieu after an inductive study of English political institutions of the early eighteenth century.[10] Because this neatly formulated theory has become imbedded in our political thought, there is a tendency to regard it as a statement of the eternal verities and to use it to prevent the progress of law and politics. It is submitted that the difficulties of the judges who believe declaratory relief unconstitutional arise from a conception of the judicial function which ignores many customary forms of activity of modern courts.[11]

It is contended that the granting of declaratory relief is not an exercise of the judicial function for three reasons: first, be-

[4] Cal. Const. Art. III, § 1. The division of powers of government is adhered to in most states and by the Federal government. There is no express provision in the United States Constitution, but it has been construed as requiring such a division of powers. Cherokee Nation v. Georgia (1831) 30 U. S. (5 Peters) 1, 28, 51, 8 L. Ed. 25; State of Georgia v. Stanton (1867) 73 U. S. (6 Wall.) 50, 18 L. Ed. 721; State of Mississippi v. Johnson (1867) 71 U. S. (4 Wall.) 475, 18 L. Ed. 437.

[5] (1920) 179 N. W. 350 (Mich.) 12 A. L. R. 26; followed in Stern Co. v. Friedman (1920) 179 N. W. 366 (Mich.).

[6] Michigan Public Acts of 1919, No. 150, p. 278.

[7] 19 Michigan Law Review, 86; 30 Yale Law Journal, 161; James Schoonmaker, Declaratory Judgments, 5 Minnesota Law Review, 172; William Gorham Rice, Jr., The Constitutionality of the Declaratory Judgment, 28 West Virginia Law Quarterly Review, 1.

[8] State v. Grove (Oct. 8, 1921) 201 Pac. 82 (Kansas). This case was overlooked by the Los Angeles court in the principal case.

[9] Kansas Laws 1921, ch. 168, secs. 1-6.

[10] Montesquieu, Spirit of Laws, translated by Thomas Nugent (1873), Vol. I, p. 173. In his discourse on the Constitution of England he asserts that the division of the powers of government is necessary for the preservation of the liberty of the individual. For discussion and criticism of the theory of the separation of the powers of government see Laski, Authority in the Modern State (1919) 70, 71; Goodnow, Comparative Administrative Law (1903) 20; Bondey, The Separation of Governmental Powers (1893) 76-80; Woodrow Wilson, Congressional Government (1885) 273, 284, 290; Frederick Green, The Separation of Governmental Powers, 29 Yale Law Journal, 369.

[11] See articles cited supra, n. 2.

cause the courts are called upon to decide moot questions and give advisory opinions; secondly, because there need have been no violation of a primary right of the plaintiff by a wrong of the defendant; and finally, because coercive relief is not necessary.

The first argument is easily disposed of by reference to the statute. "Any person . . . may in cases of actual controversy relating to legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties. . . ."[12] The limitation of the relief to "cases of actual controversy" eliminates the necessity of deciding merely suppositious cases. Furthermore, opinions cannot be given as to the validity of legislative or executive acts until controversies in respect to rights affected by them have arisen. Even without the express limitation the court would doubtless use its discretionary power[13] to refuse relief in such situations.[14] A recent decision of the Federal District Court for Washington suggests that perhaps even the limitation of the judicial function to actual cases is being abandoned.[15] Jurisdiction was taken of a bill in equity to enjoin the Attorney-General from prosecuting under a statute, before there had been any violation of it, on the ground that the statute provided a penalty of imprisonment for one year and that there was therefore no adequate remedy at law. Here is a declaratory judgment upon a moot point without a statute, given under the general equity jurisdiction of the Federal courts.

Passing to the second objection, the court insists that there must be an actual or threatened violation of a primary right of the plaintiff. The fact that the civil action has evolved from the criminal has unduly emphasized the juristic significance of the wrong.[16] Furthermore, the court was probably influenced by Pomeroy's analysis of a cause of action, including as essential the wrong done by the defendant.[17] But Pomeroy was not discussing the cause of action as necessary to the constitutional exercise of the judicial function; he was merely attempting to define it as it exists under present statutory law. Confining oneself to California law, there are numerous instances of judicial proceedings where there has been no breach of duty. Perhaps the

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[12] Cal. Code Civ. Proc. § 1060.

[13] Cal. Code Civ. Proc. § 1061.

[14] Such has been the policy of the English courts. In re Clay [1919] 1 Ch. 66; commented upon by Dean Harrison in his article in 9 California Law Review, 359, 364.

[15] Terrace v. Thompson (1921) 274 Fed. 841; commented upon in 20 Michigan Law Review, 218.

[16] See law review articles cited supra, n. 1.

[17] "Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, a corresponding duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict; and finally the remedy or relief itself." Pomeroy, Code Remedies, § 347, p. 460.

most familiar is the probate of a will or the administration of an intestate's estate. The decree of distribution ordinarily is neither punitive nor compensatory; it is a binding declaration of rights and duties, settling the title to all the property involved. The jurisdiction of the Superior Court over petitions to adopt a child,[18] to determine parental relations,[19] to change the name of a private person or a corporation,[20] to determine the validity[21] or nullity[22] of a marriage, and to have a voidable marriage annulled[23] furnishes further evidence sustaining the contention. Another group of actions illustrating the same point are those establishing the title to real property under the McEnerney Act,[24] the Torrens Land Act,[25] or under certain sections of the Code of Civil Procedure.[26] This list is by no means exhaustive, but it is sufficient to indicate the error of the court in insisting that a wrong, actual or threatened, is necessary to set the courts in motion.

The third objection to the declaratory judgment is that it does not enforce the rights and duties which it declares. Is the grant of coercive relief a necessary part of a judicial decision? In answering this, as in answering the second objection, we can solve our problem only by referring to existing procedure. Unless additional relief is asked for in a suit brought under Section 1050 of the Code of Civil Procedure to determine adverse claims, the judgment declares, but it does not alter, existing legal relations and no affirmative acts are ordered. Similarly, in proceedings to determine the validity or nullity of a marriage or to determine parental relations[27] there is a declaration of existing relations but no alteration of them. The proceedings to establish the validity of bonds issued by a reclamation district call for a judgment without executory relief.[28] Decrees in suits against the state or

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[18] Cal. Civ. Code §§ 226, 227, 228.

[19] Cal. Civ. Code § 231; this section was added by the legislature in 1921 Cal. Stats. 1921, ch. 136.

[20] Cal. Code Civ. Proc. §§ 1275-1278.

[21] Cal. Civ. Code § 78. See Sharon v. Sharon (1885) 67 Cal. 185, 7 Pac. 456; and Norman v. Norman (1898) 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.

[22] Cal. Civ. Code § 80. See Estate of Gregorson (1911) 160 Cal. 121, 116 Pac. 60.

[23] Cal. Civ. Code §§ 82, 83.

[24] Cal. Stats. 1906, p. 78; amended Cal. Stats. 1909, p. 163, Cal. Stats. 1911, p. 6, Cal. Stats. 1913, p. 135, and Cal. Stats. 1917, p. 80. Held constitutional in Title Document and Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; and American Land Co. v. Zeiss, 219 U. S. 47, 55 L. Ed. 82, 31 Sup. Ct. Rep. 200.

[25] Cal. Stats. 1897, p. 138; amended Cal. Stats. 1915, p. 1932. The case of Robinson v. Kerrigan passed specifically upon the point that the proceedings were judicial and not administrative and that there was no violation of the constitutional tripartite division of the powers of government (1907). 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

[26] Cal. Code Civ. Proc. §§ 738, 749, 750.

[27] Supra, n. 19, 21, 22.

[28] Cal. Pol. Code § 3480. The United States Supreme Court in Tregea v. Modesto Irrigation District held that proceedings under this statute were merely to secure evidence and therefore did not violate the United States

against the United States in the Court of Claims are binding declarations of the rights of the parties but no writ of execution can be had against the state.

It is clear that neither the redress of a wrong nor the grant of coercive relief are necessary incidents of the judicial functions. It is easier to eliminate the non-essential attributes of the judicial function than to discover the essential. Professor Borchard recently said: "Final and effective adjudication, not execution, is the essence of judicial power."[29] The declaratory judgment is such a final and effective adjudication of the rights involved. Further relief may be claimed upon it in much the same manner as suit may be brought upon an unsatisfied judgment in another state or in the same state to prevent the Statute of Limitations from running against it. A suit upon a judgment reopens none of the questions decided by it; neither does a claim for further relief upon a declaratory judgment reopen the questions therein decided. The court failed to recognize this distinction when it held that the provisions of Sections 1060 and 1062 were contradictory.

The declaratory judgment may lack some of the conventional attributes of the ordinary judgment, but it possesses that feature which is the very essence of judicial power. It, therefore, can not violate the constitutional division of powers of government, and it is hoped that its validity will soon be established by the Supreme Court of California.

H. R. M.

EVIDENCE: APPARENT ALTERATIONS IN A WRITTEN INSTRUMENT—The question whether the word "execution" as used in section 1982[1] of the California Code of Civil Procedure includes both signing and delivery or means signing only, was before the District Court of Appeal in *King v. Tarabino*.[2] The court came to the conclusion that section 1982 would not establish a workable rule if "execution" as used therein included both signing and delivery,[3] and held, therefore, that it means signing only.

Constitution. (1896) 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52. But the California Supreme Court in the later case of People v. Linda Vista Irrigation Dist. (1900) 128 Cal. 477, 61 Pac. 86, rejected the conclusions of the Tregea case and held that the judgment in such proceedings made the matter res adjudicata and was a bar even to further proceedings by the state.

[29] 30 Yale Law Journal, 121.

[1] The pertinent part of this code section reads as follows: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration [states what explanation is sufficient]. If he do that, he may give the writing in evidence, but not otherwise." For the meaning of "material" alteration as used in this section, see Cavitt v. Raje (1916) 29 Cal. App. 659, 156 Pac. 997.

[2] (June 11, 1921) 35 Cal. App. Dec. 414, 199 Pac. 890.

[3] The court in the instant case remarked that the trial judge scanned the instrument "with an improper purpose in view, a purpose impossible of